For example, following a business set-back, consolidating its business, waiting for the ripe opportunity to occur. But there may also come a time when it will resume a more active business. Now when circumstances of that sort arise, it may be, I am not saying it would be one way or the other, the right conclusion in fact is that there is really a business of the company expanding over quite a period of time, which is not interrupted by its period of inactivity. If the company still carries it on, then I think the company is carrying on business.

The appellant company is still a going concern although it had not embarked on another project of dealing in immovable property as yet. Big projects or schemes such as the one in question which involve very large sums of money and are possibly carried on with the assistance of large bank overdrafts cannot be carried on in successive dealings and for obvious reasons.

In my view, the overwhelming material of the evidence is, to my mind, consistent with "carrying on business in immovable property" and that "the true and only reasonable conclusion" does not contradict the Special Commissioners' determination. They could reasonably decide, and were entitled to decide, as they did.

I would dismiss the appeal with costs.

Gill C.J. (Malaya) and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Lim Cheng Poh & Co.*

BOH PLANTATIONS SDN. BHD. v. GUI NEE CHUAN & ORS.

[F.C. (Gill C.J. (Malaya), Ali & Wan Suleiman F.JJ.) June 14, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 41 of 1974]

Trade Marks — Passing off — Get-up of tea packets — Likelihood of confusion — Whether get-up common to trade — Special conditions in rural areas.

The appellants had brought an action (a) for an injunction to restrain infringement by the respondents of the appellants' trade marks and (b) for an injunction to restrain the respondents from passing off or attempting to pass off for tea not the goods of the appellants as and for the goods of the appellants. The learned trial judge dismissed both the claims. The appellant appealed against the dismissal of the claim for passing off. The learned trial judge had held that putting the packet of tea produced by the appellants and that produced by the respondents side by side it could not be seriously suggested that the respondent's packet could be mistaken for the appellant's packet. He said that he was convinced that a person who treated the label fairly could not be deceived into thinking that the respondent's tea was the tea of the appellant.

Held, allowing the appeal: (1) the learned judge's findings of fact were against the weight of the evidence;

(2) the learned judge was wrong to dismiss as of no account the evidence as to the foil design and in holding that there was no similarity whatever in regard to the respective designs;

(3) the learned judge failed to give due consideration in the light of the evidence produced by the appellants, to the likelihood of confusion arising in rural areas where the smaller packets of tea are chiefly sold and where the packets of tea of both parties are displayed side by side and in circumstances where some illiteracy may be presumed to exist so that reliance has to be placed on the overall visual get-up of the packets;

(4) the learned judge was wrong in holding that the features of the plaintiff's get-up were common to the trade, when this was not admitted by the appellants and ought to have been strictly proved by the respondents, so that in all the circumstances of the case, the total absence of any evidence from the respondents in this regard had the result that the appellant's case remained unanswered and uncontradicted.

Cases referred to:-

(1) *Reddaway* v. *Banham* [1896] A.C. 199, 204; 13 R.P.C. 218, 224.

(2) *Parker-Knoll Ltd.* v. *Knoll International Ltd.* [1962] R.P.C. 265, 278.

(3) *Singer Manufacturing Co.* v. *Loog* (1880-81) 18 Ch. D. 395, 412.

(4) *J.B. Williams Company* v. *R. Bronnley & Co. Ltd.* (1909) 26 R.P.C. 765, 771.

(5) *Schweppes Ltd.* v. *Gibbens* (1905) 22 R.P.C. 601, 607.

(6) *Spalding* v. *Gamage* (1915) 32 R.P.C. 273, 284.

(7) *Payton & Co. Ltd.* v. *Snelling, Lampard and Co. Ltd.* (1900) 17 R.P.C. 48.

(8) *Payton & Co. Ltd.* v. *Snelling, Lampard and Co. Ltd.* (1900) 17 R.P.C. 628, 634.

(9) *Saville Perfumery Ld.* v. *June Perfect Ld. and F.W. Woolworth & Co. Ld.* (1941) 58 R.P.C. 147, 161.

(10) *Thomas Bear & Sons (India) Ld.* v. *Prayag Narain & Jagannath* (1941) 58 R.P.C. 25, 28.

(11) *White Hudson & Co. Ltd.* v. *Asian Organization Ltd.* [1965] 1 M.L.J. 186.

(12) *Johnston* v. *Orr Ewing* L.R. (1882) 7 App. Cas. 219.

(13) *Taverner Rutledge* v. *Specters Ltd.* [1959] R.P.C. 83, 87.

(14) *Byrant & May Ld.* v. *United Match Industries Ld.* (1931) 50 R.P.C. 12, 20.

(15) *University of London Press Ltd.* v. *University Tutorial Press Ltd.* [1916] 2 Ch. 601, 610.

(16) *Claudius Ash & Sons Ltd.* v. *Invicta Manufacturing Ltd.* (1912) 29 R.P.C. 465, 475.

(17) *Wright Layman & Umney Ld.* v. *Wright* (1949) 66 R.P.C. 149, 152.

FEDERAL COURT.

R. J. Burrell Q.C. (*V. L. Kandan* with him) for the appellants.

L. P. Thean (*Chan Siew Yoon* with him) for the respondents.

Gill C.J. (Malaya): This is an appeal by the plaintiffs in the action from a judgment of Abdul Hamid J. dismissing with costs their claim for an injunction to restrain the respondents, defendants in the action, from passing-off or attempting to pass-off or causing, enabling or assisting others to pass-off for tea not the goods of the plaintiffs as and for the goods of the plaintiffs. A claim in the same action for an injunction to restrain infringement by the defendants of the plaintiffs' trade marks was also dismissed, but there is no appeal from that part of the learned judge's judgment.

The plaintiff company was first established in 1929. Since then they have been trading as growers, manufacturers, packers and sellers of tea in Malaya under the name of "TIGER TEA" in respect of which they are the proprietors of trade mark No. M/24707 which was registered on September 7, 1954 and is still subsisting. They also sell their tea under the more familiar

and well known name of "BOH TEA" in respect of which they are the proprietors of trade marks Nos. M/7673, M/27343 and M/40910 which were registered on February 22, 1951, August 1, 1956 and November 21, 1963 respectively and are still subsisting. The defendants also have on the market China and Ceylon tea, prepared or manufactured by them, under the name of "TIGER BEAR" tea in respect of which they are the proprietors of trade mark M/32734 which was registered on January 9, 1960 and is still subsisting.

It was in respect of the trade marks embodied in their packets of "BOH" tea that the plaintiffs alleged an infringement on the part of the defendants. "BOH" tea is sold in rectangular packets of one ounce, two ounces, a quarter pound, half a pound and one pound. The defendants market their "TIGER BEAR" tea in packets of the same shape, size and weight. For purposes of comparison the plaintiffs produced a two ounce packet of their "BOH" tea, which was marked as Exhibit P2, and a two ounce packet of the defendants' "TIGER BEAR" tea, which was marked as Exhibit P3.

"BOH" tea (P2) is packed in paper foil which has embossed on it the figures of a lone tiger and the device "BOH" within an oval. This paper foil wrapper is the subject of the plaintiffs' trade mark M/40910. There is a rectangular label going round the packet covering the foil wrapper leaving it exposed only on the top and at the bottom. This label bears the plaintiffs' trade mark M/7673 consisting of the seal "BOH" positioned in between the words "GOLD" and "SEAL" in gold colour on the top part of the label, with the words "BOH" and "TEA" one below the other underneath the gold seal device on the bottom portion of the label. On each of the four corners of the rectangular label there is a triangular panel.

"TIGER BEAR" tea (P3) is also packed in paper foil which has embossed on it the figures of a springing tiger and bear about to come to grips and the device "NOW" within an oval. There is a rectangular label going round the packet covering the foil wrapper leaving it exposed only on the top and and at the bottom. On the top portion of this label is the defendants' trade mark of a springing tiger with a bear within a circle positioned in between the words "TIGER" and "BEAR", beneath which are the words "BRAND", "CEYLON" and "TEA" one below the other on the bottom portion of the label. On each of the four corners of the label there is a perpendicular panelling.

In dealing with the plaintiffs' claim for infringement of their trade marks, the learned judge compared the essential features of P2 with those of P3. He found no resemblance between the gold seal on P2 and the circular mark on P3 in that their colours and shapes are different and the circular device on P3 is larger in size than the gold seal on P2. He also found that the words "GOLD" and "SEAL" on P2 have different colours and are printed in smaller letters than the words "TIGER" and "BEAR" on P3.

As regards the device of a Tiger on P2, he found that looking at it from a distance of two to three feet it was hardly noticeable, so that he was unable to say that the tiger device was an essential feature of the plaintiffs' mark. He further found that P3 showed very distinctly the device of a springing Tiger and Bear and that it was shown on the foil and all sides of the label. He thus found that the defendants' device of Tiger and Bear seemed to be a distinguishable feature of their mark. One other difference he found between the labels of P2 and P3 was that the gold seal mark on P2 appears only on each side of the label, whereas the circle mark on P3 appears on all the sides of the label. This, however, is not quite correct, as the gold seal mark also does appear on all sides of the label. Comparing the side panels found on P2 and P3, he was unable to hold that there was a close resemblance except for the colour which was not covered by the plaintiffs' registered trade mark and in respect of which they could claim no monopoly.

Dealing next with the foil designs, the learned judge formed the view that it could probably be said that the oval design with the letters "NOW" on P3 bore some resemblance to the plaintiffs' oval design with the letters "BOH", but he went on to say that looking at both foils side by side he thought P2 could easily be distinguished from P3.

The conclusions at which the learned judge arrived are stated in his judgment as follows. The mark "BOH" was the most distinguishing feature of the plaintiffs' packet, and so were the gold seal and the rectangular block. On comparison, the marks found on P2 and P3 differ very materially. It was not possible therefore to hold that the essential features of the plaintiffs' packet had been copied by the defendants, especially in view of the concession made by the plaintiffs' main witness that there was no copy feature by feature. Looking at P3 there was nothing to suggest that it emanated from the plaintiffs. No customer examining the plaintiffs' wrapper foil would find anything distinguishing or distinctive about it. In the result, he held that the plaintiffs' claim for infringement of their trade marks could not succeed.

As I have stated earlier, there is no appeal against the judge's finding as regards infringement, but I have dealt with it briefly because of the submission made on behalf of the appellants that the learned judge's decision on infringement coloured his decision on the claim for passing-off. An action for infringement of a trade mark is of course essentially different from an action for passing-off.

In an action for infringement the plaintiff complains that the defendant has infringed his trade mark by taking in its entirety, or by taking a substantial portion of it, or by colourably imitating it, and he relies on his statutory title to the exclusive use of the mark in question for goods of a specified kind. In a passing-off action the plaintiff's case is less specialised, for he complains that the defendant is using means which are calculated to pass off, or to cause to be passed off, the goods of the defendant as and for those of the plaintiff, and the means may or may not comprise or consist of the taking of a trade mark, either registered or not. (See *Kerly* on Trade Marks, 10th Edition, page 307, paragraph 15-02).

The foundation and nature of a passing-off action is that it is an actionable wrong for the defendant to represent, for trading purposes, that his goods are those or that his business is that of the plaintiff, and it makes no difference whether the representation is effected by direct statements, or by using some of the badges by which the goods of the plaintiff are known to be his, or any badges colourably resembling these, in connection with goods of the same kind, not being the goods of the plaintiff, in such a manner as to be calculated to cause the goods to be taken by ordinary purchasers for the goods of the plaintiff. (*Kerly* on Trade Marks, 10th edition, page 362, paragraph 16-02).

The essence of a passing-off action, as stated by Lord Halsbury L.C. in *Reddaway* v. *Banham,*[1] is that nobody has any right to represent his goods as the goods of somebody else. His Lordship went on to say:

"How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more likely it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact, the legal consequence appears to follow."

The rule stated above has often been treated as only a special instance of a more general rule that any misrepresentation calculated to give one trader the benefit of another's good-will is actionable; or even more generally that any misrepresentation calculated to injure another in his trade or business is to be regarded as passing off. (See *Kerly* on Trade Marks, 10th edition, page 363, paragraph 16-03).

The principle of law governing passing-off cases was put even more broadly by Lord Morris in *Parker-Knoll Ltd.* v. *Knoll International Ltd.*[2] when his Lordship said: —

"In the interests of fair trading and in the interests of all who may wish to buy or sell goods the law recognizes that certain limitations upon freedom of action are necessary and desirable. In some situations the law has had to resolve what might at first appear to be conflicts between competing rights. In solving the problems which have arisen there has been no need to resort to any abstruse principle but rather ... to the straightforward principle that trading must not only be honest but must not even unintentionally be unfair."

Even if the defendant himself deceives nobody, if by his conduct he enables or induces his own customers to deceive their customers, that may be actionable. In other words, no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false misrepresentation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. (*Per* James L.J. in *Singer Manufacturing Co.* v. *Loog*[3]).

What a plaintiff has to prove in a passing-off action was laid down by Cozens-Hardy M.R. in the case of *J. B. Williams Company* v. *R. Bronnley & Co. Ltd.*[4] where his Lordship said:

"It seems to me that in the first place he must, in order to succeed, establish that he has selected a peculiar — a novel — design as a distinguishing feature of his goods, and that his goods are known in the market, and have acquired a reputation in the market, by reason of that distinguishing feature, and that unless he establishes that, the very foundation of his case fails. If he takes a colour and a shape which are common to the trade the only distinctive feature is that which he has added to the common colour and the common shape, and unless he can establish that there is in the added matter such a similarity as is calculated to deceive, I think he must fail. Now what he has to prove on the question of 'calculated to deceive' cannot, I think, be better stated than it is in *Schweppes Ltd.* v. *Gibbens*[5] where Lord Halsbury said: 'The whole question in these cases is whether the thing — taken in its entirety, looking at the whole thing, — is such that, in the ordinary course of things, a person with reasonable apprehension and with proper eyesight would be deceived'."

It will be observed from the above statement of the law that for a plaintiff to succeed in an action for passing-off, he must show that he has acquired a reputation in that which he claims to have been taken by the defendant, such reputation being in the nature of the right of property. Passing-off constitutes an invasion of such a right, the consequences of the defendant's misrepresentation being that the public are likely to be deceived or confused and that the plaintiff's good-will is likely to be injured. It is not necessary for the plaintiff to show that the defendant intended to deceive; it is sufficient to show that deception is likely to result by reason of the defendant's acts.

In *Spalding* v. *Gamage*[6] Lord Parker said:

"My Lords, the basis of a passing-off action being a false representation by the defendant, it must be proved in such case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is where the representation is implied in the use or imitation of a mark, trade name or get-up with which the goods of another are associated in the minds of the public, or a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances, of the case, the use by the defendant in connection with the goods of the mark, name or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on."

His Lordship went on to state at page 286:

"It was also contended that the question whether the advertisements were calculated to deceive was not one which your Lordships could yourselves determine by considering the purport of the advertisements themselves, having regard to the surrounding circumstances, but was one which your Lordships were bound to determine upon evidence directed to the question itself. I do not take this view of the law. There may, of course, be cases of so doubtful a nature that a judge cannot properly come to a conclusion without evidence directed to the point; but there can be no doubt that in a passing-off action the question whether the matter complained of is calculated to deceive, in other words, whether it amounts to a misrepresentation, is a matter for the judge, who looking at the documents and evidence before him, comes to his own conclusion, and, to use the words of Lord Macnaghten in *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.* (17 R.P.C. 635), 'must not surrender his own independent judgment to any witness whatever'."

Halsbury's Laws of England, 3rd edition, Volume 8, page 597, paragraph 998 under the heading "Essentials of the cause of Action" summarises the law as follows: —

"The plaintiff must prove that the disputed name, mark, sign or get-up has become distinctive of his goods in the sense that by the use of his name or mark, etc., in relation to goods they are regarded, by a substantial number of members of the public or in the trade, as coming from a particular source, known or unknown; it is not necessary that the name of the

plaintiff's firm should be known. Where the dispute concerns goods sold in Great Britain, the name, mark, etc., must have become so distinctive in this country or, in the case of goods exported abroad, in the country to which they are exported. The plaintiff must further prove that the defendant's use of name or mark was likely or calculated to deceive, and thus cause confusion and injury, actual or probable, to the goodwill of the plaintiff's business, as, for example, by depriving him of the profit that he might have had by selling the goods which, *ex hypothesi*, the purchaser intended to buy. Thus the cause of action involves a combination of distinctiveness of the plaintiff's name or mark and an injurious use by the defendant of the name or mark or a similar name or mark; how far the defendant's use of any mark, sign, picture or get-up does or does not amount to passing off is in substance a question of evidence; the question whether the matter complained of is likely to deceive is a question for the court."

It is clear that the right of property upon which the plaintiff seeks to found his action for passing off may comprise the get-up of his goods. Such get-up must be distinctive of the plaintiff's goods, as no account will be taken of matter which is shown to be common to the trade. In *Payton & Co.* v. *Snelling, Lampard & Co. Ld.*[7] Lindley M.R. said at page 52:

"After all said and done, what have we to consider? What is it that the plaintiffs must make out in order to entitle them to succeed in this action? They must make out that the defendants' goods are calculated to be mistaken for the plaintiffs', and, where, as in this case, the goods of the plaintiff and the goods of the defendant unquestionably resemble each other, but where the features in which they resemble each other are common to the trade, what has the plaintiff to make out? He must make out not that the defendant's are like his by reason of those features which are common to them and other people, but he must make out that the defendant's are like his by reason of something peculiar to him, by reason of the defendant having adopted some mark, or device, or label, or something of that kind, which distinguishes the plaintiff's from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to that he fails.

It appears to me that when once you get that clearly in your mind; when you eliminate those features which are common to the trade and ask yourselves, not whether the plaintiff's and the defendant's things are alike, but whether the defendant has copied that which distinguishes the plaintiff's, the conclusion must be different from that at which the learned judge arrived."

Romer L.J. in the same case said at page 55:

"I should like also to make this observation with regard to the case now before us. The plaintiffs' goods have been put comparatively recently on the market in their present get-up. This is not the case where a peculiar get-up of goods has been for a long time, for many years, on the market, so as to become identified in course of time with the plaintiffs' goods and with no others, so that that get-up almost of necessity is identified in the market or amongst the public as representing the plaintiffs' goods. That is not this case. Their goods have only been comparatively recently put upon the market."

I would pause here to observe that the present case is not one where the plaintiffs' goods had been upon the market comparatively recently.

In *Payton's* case[8] when it went up to the House of Lords, Lord Macnaghten said:

"Now, when a person comes forward to restrain a colourable imitation of the sort in a case like this, and when he cannot prove that the defendants have tried to steal his trade, he has to make out beyond all question that the goods are so got up as to be calculated to deceive. The principle is perfectly clear — no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application, and when it is a case of colourable imitation I think it is very desirable to bear in mind what Lord Granworth said on one occasion — that no general rule can be laid down as to what is a colourable imitation or not. You must deal with each case as it arises and have regard to the circumstances of the particular case."

The basis of the plaintiffs' claim in respect of passing-off, as pleaded in paragraph 8 of their statement of claim, is that the defendants have put upon the market tea not of the plaintiffs' manufacture having a get-up and bearing labels which are colourable and deceptive imitations of the well known get-up and labels of the plaintiffs' "BOH" tea. In paragraph 10 of their statement of claim the plaintiffs aver that the use by the defendants of the get-up on their own "TIGER BEAR" tea is calculated to lead to deception and to the belief that their tea is the tea of the plaintiffs' and calculated to cause and must have caused tea not of the plaintiffs' manufacture to be passed-off as and for the tea of the plaintiffs whereby the plaintiffs have suffered and will suffer damage.

The main evidence in support of the plaintiffs' claim was given by Mr. Tristan Beauchamp Russell who joined the company in 1954 as an assistant at the Boh Estates in Cameron Highlands. He later became the mercantile assistant of the company at their head office in Kuala Lumpur with responsibility for marketing. He then became a director of the company and has been the chairman of their Board of Directors since 1966. His evidence briefly is that he is familar with the plaintiffs' trade marks since 1954 and that it has been the company's policy to take steps to protect their trade marks. They have large sales of their tea in Malaya, and they spend considerable sums of money on advertising their products on the cinema, radio and television and in newspapers and periodicals. In advertising their Boh Tea the emphasis is on the name and the general get-up of their packs. They have brought criminal action against people actually infringing their trade marks. They have taken civil actions for infringement and passing-off against other sellers of tea. They have opposed registration of trade marks which they think conflict with their own, and they have issued warning notices to others. Although there have been a large number of brands of tea produced which are very similar to theirs, the volume of tea sold of such brands has been very small in relation to the total size of the tea market and those brands are insignificant when compared with the major brands sold in the country. As a result of their warning notices some brands disappeared from the market for a short time.

As regards the designs of the plaintiffs' packets of tea, Mr. Russell's evidence is as follows. Their designs were introduced before the last war in Malaya. The letters "BOH TEA" on P2 were registered with a distinctive type of lettering. The device of gold seal with the letters "BOH" positioned between the words "GOLD" and "SEAL" was registered under Certificate No. M/7673. The other feature which is important in all their packets is the foil design, the registration of which is covered by Certificate No. M/40910. The general appearance of the defendants' packet of "TIGER BEAR" tea (P3) is very similar to their packet of "BOH TEA" (P2). It has the same type of side panelling on all sides, similar to their packet. The lay-out of the lettering on P3 is similar, with the device of a springing tiger and bear placed similarly to the device of the seal on their packet. The end view of the packet is also similar. The most important feature is that the "TIGER BEAR" packet

has a design on the foil which is very similar to the design on the foil of their packet of "BOH TEA." The lay-out on the "TIGER BEAR" foil is exactly the same as the lay-out on their foil, the only difference being that in place of their device "BOH" on their foil of P2, the foil on P3 uses the device "NOW" The size of the design and the background of the milling of the foil are identical. The size of the defendant's packets are exactly the same as theirs, and they have the same weight and the same similarities. They registered their foil design in 1963 in order to give their packet added distinctiveness. By that time they were already beginning to suffer from imitation and passing-off of their designs. As far as he knew the defendants' embossed foil did not appear on the market until 1969, prior to which the defendants used a plain foil without any emboss as shown on the defendants' packet marked as Exhibit P4. They decided to take legal action when P3 appeared on the market, but there was some delay in instituting proceedings because their then legal adviser had left the country.

Under cross-examination Mr. Russell conceded that if one looked at P3 feature by feature it could not be said to be a direct copy of P2. But he added that looking at it as a whole the effect was one of being a copy because looking at P2 and P3 side by side they were indistinguishable. As regards the side panels on P2 he said that the lines are registered, though they do not include the chocolate coloured triangle, and the lines come slanting down. On P3 on the other hand, he said, the lines are waving and they go straight down and the panels are different. He went on to say the side panels are for the purpose of distinguishing the packs and for decorating the labels. He agreed that their side panels were not the only ones registered.

With regard to P2 Mr. Russel said that the name "BOH" which appears on both sides of the packet, the colouration and the embossed foil are its distinguishing features. The gold seal is also one of the distinguishing features, and so is the central rectangular block. Both P2 and P3 are rectangular in shape and there are other brands with similar shapes. The shape is not their own invention. Both P2 and P3 use aluminium foil wrapping paper. The picture devices on the foil are not the same. The position of the Tiger on P2 is different. In P3 there is an additional animal. Boh tea is packed in 5 sizes and so also is the defendants' tea. The other brands are normally packed in the same standard weights. What prompted them to take action was the device on the aluminium foil of P3 which was first introduced to the market in 1969.

Under re-examination Mr. Russell said that when the defendants' tea first appeared in 1960 the pack was of unmilled aluminium foil. The company did consider legal action then, but decided against it. They filed an objection to the registration of the defendants' trade mark. But the defendants filed a counter statement that their trade mark in no way resembled their trade mark. He believed that it was for that reason that the Registrar of Trade Marks agreed to register the defendants' trade mark. He reiterated that they were the first to introduce into the market the get-up as shown on P2. A number of packers used their get-up because of the popularity of their tea and because of the advertising done by them, so that it was a case of the other packers wishing to climb on the same bandwagon. He repeated that they were the first to introduce the foil design in this country and that the defendants put the foil design on P3 so as to make it look like P2 in order to catch the eyes of the purchasers and to make it appear that both packets came from the same origin.

The plaintiffs' market their tea through Messrs. Harper Gilfillan. Mr. Tan Tiong Choon (PW3), a marketing executive of Harper Gilfillan, gave evidence to say that he conducted a survey at the request of the plaintiffs to ascertain whether people could recognize the brands of tea they were in the habit of drinking. He took with him a Commissioner of Oaths when he called on some people including some retailers. The answers to the questions which he put to such people were reduced to writing by the Commissioner for Oaths. He showed them packets of Tiger tea (Exh. P21), Tiger Bear tea (Exh. P22) and Boh tea (Exh. P23). Of the 13 people he interviewed, 11 described "Tiger Bear tea as "Boh" tea. One of them called it "Teh Boh Baru", and the other said "Sarupa Teh Boh".

One of the persons interviewed was a woman named Ester d/o Jacob (PW5). When shown "Tiger" tea she called it Tiger tea, when show "Tiger Bear" tea she called it Boh Tea, and when shown "Boh" tea she called it Boh tea. She gave evidence in court to confirm that a Chinese gentleman had interviewed her in her house and asked her certain questions which she answered and then signed the questionnaire, which was attached to a statutory declaration made by her. Her evidence under cross-examination was as follows. She was in the habit of drinking tea and she had bought Boh tea for 14 years. She knew what it looked like. She used to ask for Boh tea and she used to be given tea like P23. She would take Tiger tea as Boh tea if it was given to her as Boh tea, as she could not read herself and would depend on the shop keeper. In answer to a question put to ber by the court she said that she bought Boh tea all the time. She did not select it herself; she asked the shop keeper and she was given Boh tea.

Tan Chong Kiew (PW6), a supervisor of Soon Jin Primary School, was another one of the persons interviewed who gave evidence in court. He confirmed that he answered certain questions put to him. He signed the questionaire and affirmed a statutory declaration to which it was annexed. His answers to the three relevant questions were exactly the same as those of Ester's. In answer to the court he said that one of the packets shown to him was Gold Dollar tea. Under cross-examination, however, he said that the Gold Dollar tea shown to him in court was not one of the 3 packets shown to him by the person who interviewed him. He signed in English as he can read A B C but he does not speak English. When shown P23 in court he said it was Boh tea which he had drunk before and he could identify the letters "BOH" and "TEA". When shown P22 he said it was not "Boh" tea. In re-examination he said that one of the packets

produced was Gold Dollar tea. The first packet shown to him was Tiger tea. When the second and third packets were shown to him he had said "Boh" tea. On further questioning by the court he said that the packets were shown to him very fast. It took a few seconds. He lifted one packet after the other and then said that he had no time and was rushing to school. He was asked whether he drank Boh tea and he said "Yes". The man interviewing him asked him whether he could identify different types of tea. He asked him questions which he answered and which were taken down. The packet shown to him was 4 feet from him and it appeared to be Gold Dollar tea. He concluded by saying that he could not remember what tea was shown to him.

Aisah binte Najamuddin (PW7) was the third witness who gave evidence in court about her having been interviewed by a Chinese gentleman, who asked her if she was familar with names of products and brand names of tea. Her answers were recorded and she signed the questionnaire and the statutory declaration. The questionnaire shows that when shown a packet of Tiger tea she called it "Chap Harimau", that she described the packet of "Tiger Bear" tea as "Teh Boh" and the packet of Boh tea also as "Teh Boh". She said in evidence that P21 was first shown to her. If she was not mistaken P2 was the second packet shown to her and added that she did not know what brand it was. She then identified P23 as Boh tea. In answer to the court she said that if she bought Boh tea, and if she took it herself, she would choose P23.

In their statement of defence, the defendants denied that the get-up and labels of the tea which they had put upon the market were colourable and deceptive imitations of the plaintiffs' get-up and labels. They further pleaded that tea and tea dust of various tea merchants had long been and is on sale in Malaysia in the get-up similar in design and colouring to the plaintiffs' get-up and that such get-up is common to the tea trade. However, they called no evidence in support of their case.

In dealing with the plaintiffs' claim for passing-off, the learned judge considered the principles of law as to what is necessary for a plaintiff to prove as stated in *J. E. Williams & Co.* v. *H. Bromley*[4] and *Halsbury's* Laws of England (9th edition) Volume 38, page 597 paragraph 998, which I have set out earlier in my judgment. He then considered the following passage from the judgment of Lord Halsbury L.C. in *Schweppes Ltd.* v. *Gibbens*[5] at page 606: —

"The question that we have to determine is whether in selling the bottle a person is likely to be deceived by the resemblance of the one thing to the other; and if a person is so careless that he does not look, and does not, as I think Lord Macnaghten described it in another case, 'treat the label fairly', but takes the bottle without sufficient consideration and without reading what is written very plainly indeed upon the face of the label in which the trader has placed his own name, then you certainly cannot say he is deceived — in fact he does not care which it is. That would be the true inference which I think a person would draw from conduct so described.

The whole question in these cases is whether the thing — taken in its entirety, looking at the whole thing — is such that in the ordinary course of things a person with reasonable apprehension and with proper eyesight would be deceived. Looking at it in this way, it seems to me it is only necessary here to say that, if you do look and if you do treat the two labels fairly, no human being could be deceived."

The learned judge next referred to his findings which he had made as to the essential features of the plaintiffs' packet in connection with the plaintiffs' claim for infringement, which he thought were relevant in considering the question of passing-off and needed no repetition. The conclusion at which he arrived was that putting the packets P2 and P3 side by side he did not believe that it could be seriously suggested that the defendants' packet could be mistaken for the plaintiffs' packet, particularly when he found the word "BOH" in bold letters appearing on both sides of the label (lengthwise) staring right into his face, and that the side panels on P2 and P3 are materially different although the colour is similar. He went on to add that he was convinced that a person who treated the label fairly could not be deceived into thinking that the defendants' tea was the tea of the plaintiffs'.

It would appear that in reaching the above conclusions the learned judge was influenced at least to some extent by what Lord Halsbury said in *Schweppes'* case about putting the two things side by side in order to ascertain whether there was any likelihood of deception. Comparing the two things by putting them side by side may be a good test if there is no other relevant evidence. This would seem clear from what Lord Halsbury went on to add to what has been cited above. This is what his Lordship said:

"Indeed, in corroboration of that view, I may say that in this case there is not a particle of evidence that any human being ever was deceived. The notion that one could supply evidence of that sort because in collecting bottles two bottles other than Schweppes' were included in a mass of bottles collected from a public house is somewhat absurd. The real truth is that here, looking at the whole thing there is such a distinctive mark negativing its being Schweppes that it would be to my mind absolutely absurd to suppose that anybody treating the label fairly could be deceived. That is the whole substance of the case."

In the present case, however, there was evidence to show that there was a likelihood of the defendants' packet of tea being mistaken for the plaintiffs' packet.

The learned judge summed up the evidence adduced on behalf of the plaintiffs and his conclusions therefrom as follows: —

"On the question of deception the plaintiffs have called Mr. Tan Tiong Choon (PW3) the surveyor and three persons interviewed when conducting the survey. Ester d/o Jacob (PW5) a housewife who allegedly identified P3 as Boh Tea in the questionnaire testified to the effect that she had bought Boh Tea for 14 years and she knew how it looked like. She had no difficulty in identifying the plaintiffs' tea. When buying Boh Tea it was her practice to ask for Boh Tea. One Tan Chong Kiew (PW6) a supervisor of Soon Jin Primary School also had no difficulty in identifying Boh Tea and the last witness Aisah Najamuddin (PW7) too had no difficulty when asked to identify Boh Tea in the witness box.

In the light of the evidence given by these witnesses I do not think I am justified in placing any weight on the opinion expressed by Mr. Tan Tiong Choon the surveyor. In any event it is for the plaintiffs to establish that there was probability of deception. Looking at P3 and after considering the whole of the get-up, I am not satisfied that the plaintiffs have succeeded in establishing the probability or likelihood of deception."

With great respect to the learned judge, the evidence of the surveyor, Mr. Tan Tiong Choon, that 11 of the persons questioned described Tiger Bear Tea as

Boh Tea was not seriously challenged. The other two persons described Tiger Bear Tea as "Teh Boh Baru" or as "Sarupa Teh Boh". The fact that Ester d/o Jacob (PW5) testified to the effect that she had bought Boh Tea for 14 years and that she knew how it looked like does not alter the fact that she did mistake Tiger Bear Tea for Boh Tea. The same is true of Tan Chong Kiew (PW6) and Asiah bt. Najamuddin (PW7). There was thus ample evidence that Tiger Bear Tea was likely to be mistaken for Boh Tea. In the circumstances I am of the opinion that the learned judge's findings of fact are against the weight of the evidence.

In view of what I have just said, in my judgment the learned judge was wrong in reaching his conclusions solely on an ocular comparison between the two packets. In this connection I would refer to the following passage from the judgment of Sir Wilfrid Greene M.R. in *Saville Perfumery Ld.* v. *June Perfect Ld. and F. W. Woolworth & Co. Ld.*[9]

"The questions therefore arises: First is there a resemblance, and, second, is the resemblance so close as to be likely to cause deception? In answering these questions, ocular comparison is, of course, an important matter to be taken into consideration, in some cases it may be conclusive one way or the other. But if the court were to confine itself to this test the protection afforded by the law of trade marks would in many cases prove illusory. It would be still more illusory if, as Mr. Lloyd-Jacob contended, no witness could be listened to who was not prepared to say that when he saw the mark complained of he had in his mind the actual registered mark and made a comparison between the two. Propositions of this kind, if accepted, would as it appears to me, divorce the law of trade marks from business realities. In the case of certain goods, traders, and perhaps the public too, may be expected to receive so strong an impression of the actual mark as to lead to the conclusion that nothing short of a degree of resemblance apparent to the eye will cause the necessary likelihood of deception. On the other hand, many articles do not fall within this category. In the present case, for example, the evidence makes it clear that traders who have to deal with a very large number of marks used in the trade in which they are interested, do not, in practice, and indeed cannot be expected to, carry in their heads the details of any particular mark, while the class of customer among the public which buys the goods does not interest itself in such details. In such cases the mark comes to be remembered by some feature in it which strikes the eye and fixes itself in the recollection. Such a feature is referred to sometimes as the distinguishing feature, sometimes as the essential feature, of the mark. I do not pause to examine these appellations, since the idea conveyed is free from ambiguity. In deciding whether or not a feature is of this class, not only ocular examination, but the evidence of what happens in practice in the particular trade is admissible.... I now turn to the claim based on passing-off. It does not necessarily follow that a trader who uses an infringing mark upon goods is also guilty of passing-off. The reason is that in the matter of infringement, as I have already pointed out, once a mark is used as indicating origin, no amount of added matter intended to show the true origin of the goods can affect the question. In the case of passing-off on the other hand, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff. Such proof may be very difficult, but theoretically at any rate the result may be as I have stated."

In *Thomas Bear & Sons (India) Ld.* v. *Prayag Narain & Jagannath*[10] Viscount Maugham delivering the judgment of the Privy Council said:

"It seems desirable to state the view of their Lordships on some of the topics of criticism of the views of the learned judges which were urged on behalf of the appellants. Their Lordships think that the test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase; and marks with many differences may yet have an element of similarity which will cause deception, more especially, if the goods are in practice asked for by a name which denotes the mark or the device on it."

Counsel for the plaintiffs, Mr. Kandan, urged upon the learned judge to consider the Singapore case of *White Hudson & Company Limited* v. *Asian Organisation Limited*[11] where consideration was given to the conditions in Singapore and the fact that the get-up is important for the non-English speaking members of the public. The learned judge thought that the facts of that case differed materially from the facts of this case. With respect, I disagree because what was decided in that case has an important bearing on this case. The plaintiffs in that case had sold their cough sweets in Singapore since 1953 loose in orange colour cellophane wrappers on which was printed the word "Hacks" in Roman characters only. In March 1958 the defendants entered the same market with cough sweets in a white cellophane wrapper, but in May of that year they went over to using an orange wrapper simialr to the plaintiffs' but bearing the word "Pecto". The plaintiffs brought an action to restrain passing-off. Tan Ah Tah J. found that no other wrapped cough sweets had been sold loose, that the sweets were called by the local population "Red Paper Cough Sweets", that the plaintiffs' get-up had become distinctive of their goods, that the get-up of the defendants' sweets resembled the plaintiffs' to such an extent as to lead to confusion, that the difference in the names written on the wrappers was not sufficient to distinguish the goods in the eyes of the purchasing public largely unable to read English, and that passing-off had therefore been established. The judgment was reversed by the Singapore Court of Appeal by a majority (Wee Chong Jin J. dissenting). On appeal to the Privy Council it was held that the trial judge was right in finding the plaintiffs' wrapper distinctive, particularly as their sweets had become known as "Red Paper Cough Sweets". Lord Guest in delivering the judgment of the Privy Council said (at pages 188 and 189):

"The first matter which a plaintiff must prove in a passing-off action is that the get-up of his goods has become distinctive of these goods and that it was associated or identified with them.... The fact that non English speaking customers were in the habit of asking for 'red paper cough sweets' shows clearly that to these customers the get-up of the red colour wrapper had become associated or identified with the plaintiffs' goods....

The second matter which in order to succeed the plaintiffs must establish is that in the circumstances there is a probability of confusion between the goods of the plaintiffs and of the defendants.... Important evidence was given for the plaintiffs and accepted by the trial judge that some retailers in Singapore displayed both 'Hacks' and 'Pecto' sweets in the same jar. Further evidence was given by a witness who visited six shops in Singapore. He asked for 'Hacks' sweets and he was on each occasion given 'Hacks' or 'Pecto' sweets mixed together. It may well be that to an English speaking customer the word 'Pecto' on the respondents' sweets would be sufficient to distinguish their sweets from those of the plaintiffs. But according to the trial judge the majority of purchasers of these sweets were unable to read English and accordingly 'Pecto' is not sufficient to distinguish the defendants' goods....

As the trial judge succinctly expresses it, 'so far as non-English speaking members of the public are concerned the get-up is all important in this case, while the name is insignificant.' The courts will have regard to conditions existing in foreign markets and to the type of customers (*Johnston* v. *Orr Ewing*[12]).

... In their Lordships' view it is not necessary that the design should be novel, provided the get-up is distinctive of the plaintiffs' goods and has been identified with them."

In my judgment what is stated above is relevant to and true of the facts in this case. In *Johnston's* case the Lord Chancellor (Lord Selborne) said at page 225:

"But although the mere appearance of these two tickets could not lead anyone to mistake one of them for the other, it might both be taken by natives of Aden or of India unable to read and understand the English language, as equal symbolical of the plaintiffs' goods. To such persons or at least to the differences between the two labels, it might probably appear that these were only differences of ornamentation, posture, and other accessories, leaving the distinctive and characteristic symbol substantially unchanged."

Mr. Kandan also cited the following passage from the judgment of Danckwerts J. in *Taverner Rutledge Ltd.* v. *Specters Ltd.*[13]

"When you come to the reproduction of the fruit drops, in the defendants' design they bear the name 'Specters' instead of 'Taverners', but otherwise they are almost exactly similar. The arrangement is almost precisely the same and the colours, though in some cases perhaps slightly darker in the defendants' design, are exactly similar otherwise to the plaintiffs', and the series in which they appear in different colours is completely in accordance with the plaintiffs' own arrangement. It became obvious to me, and it is now accepted, that an artist who was employed by Lloyd's to produce a design to the defendants, whether goaded by the defendants or not, did in fact copy the plaintiffs' design."

The learned judge took the view that the plaintiffs in that case succeeded because it was found that the resemblance between the decorations of the tins of sweets of the respective parties were remarkable, and went on to hold that in the present case he could say with full conviction that there was no similarity whatever in regard to design. He also expressed satisfaction that there was no probability of confusion. Here again I must say, with respect, that I find myself unable to agree with the learned judge's findings, because in my judgment there was ample evidence in this case of the probability of confusion. I am also of the opinion that there was evidence of the similarity of the designs on the foil wrappers of P2 and P3 and of the general get-up of the packets.

As regards the get-up of the plaintiffs' packet the learned judge had this to say:

"In the present case the get-up of the plaintiffs' packet has not been shown to be the peculiar feature of the plaintiffs' goods or that the get-up has been associated and identified with them. Looking at the packets exhibited on Board E which has been produced before the court, the defendants are I think, justified in maintaining that the colour and the shape of their packets are quite common to the trade."

Indeed what the learned judge found was the main and perhaps the only defence of the defendants to the plaintiffs' claim for passing-off. However, the defendants produced no evidence whatsoever to substantiate their defence. Now it is clear from the authorities that common to the trade means not only "commonly used in the trade" but "open to the trade to use" In *Hudson's* case[11] Lord Guest said at page 188:

"An attempt was made by the defendants to show that the red coloured wrappers were common to the trade. This attempt failed, as it was clear on the evidence that prior to 1953 no wrapper similar to that used on the plaintiffs' sweets had ever been used on sweets, whether medicated or otherwise in Singapore, and from 1953 to 1958 the plaintiffs' sweets were the only sweets so wrapped which were sold in Singapore."

In the present case there is unrebutted evidence of Mr. Russell that they were the first to introduce into the market the get-up as shown on P2, and that a number of packers used their get-up because of the popularity of their tea and because of the advertising done by them. There was no evidence to contradict Mr. Russell's evidence that it is the other traders who copied their get-up. I do not think it can be doubted that the peculiar get-up of the plaintiffs' tea has been on the market for many years so as to become identified in the course of time with their goods and with no others. There is evidence that the plaintiffs took actions against some of the traders. The fact that they took no action against some of the other traders cannot mean that their get-up has become common to the trade.

Where it is apparent that the defendant is inching his way towards a passing-off situation the court ought not to be astute to find that the allegation of passing-off has failed. In *Byrant & May Ld.* v. *United Match Industries Ltd.*[14] Clauson J. said:

"Bearing in mind the class of customer that I think it is proper that I should consider, namely, a customer who knows, among other things, that a box with a label in yellow and black is common to the trade, who also knows that an upturned scroll with an object like an ark in the concavity of it is among the distinguishing characteristics of Byrant & May's well known label, I must consider whether looking at the boxes I am satisfied that confusion is possible or probable. In my opinion, studying the two boxes, giving such consideration as I can to what one would expect in the case of such a class of customer, giving the best consideration that I can to the evidence that I have had, which included a certain amount of evidence of what was said to be actual confusion occasioned, I have come to the conclusion that not only is confusion possible, but indeed probable."

What is worth copying is *prima facie* worth protecting. (See *University of London Press Ltd.* v. *University Tutorial Press Ltd.*[15]). When once you establish the intent to deceive, it is only a short step to proving that the intent has been successful, but still is is a step even though it be a short step. (*Per* Earl Loreburn L.C. in *Claudius Ash & Sons Ltd.* v. *Invicta Manufacturing Ltd.*[16]). As was stated by the Master of the Rolls (Lord Greene) in *Wright Layman & Umney Ld.* v. *Wright*[17] "Honest men do not attempt to sail near the wind."

For the reasons I have stated I agree with the following submissions made by learned counsel for the appellants, Mr. R. J. Burrell Q.C. The learned judge failed to appreciate the degree to which the get-up is shown by the evidence to have been an important element of the plaintiffs' goodwill In this connection the plaintiffs' efforts to "police" their marks and goodwill together with the importance attached to the novel character of the embossed foil design would appear to have been overlooked entirely. The learned judge was wrong to dismiss as of no account the evidence as to the foil design and in holding that there was no similarity whatever in regard to the respective designs. The learned judge failed to give due consideration, in the light of the evidence produced by the plaintiffs, to the likelihood of confusion arising in the rural areas where the smaller packets are chiefly sold and where the packets of tea of both parties are displayed side by side and in circumstances where some illiteracy may be presumed to exist so that reliance has to be

placed on the over all visual get-up of the packets. The judge was wrong to hold that the features of the plaintiffs' get up were common to the trade, when this was not admitted by the plaintiffs and ought to have been strictly proved by the defendants, so that in all the circumstances of the case the total absence of any evidence from the defendants in this regard had the result that the plaintiffs' case remained unanswered and uncontradicted.

I would allow this appeal with costs here and in the court below and make an order for an injunction in the terms of prayer (b) and consequential orders under prayers (c), (d) and (f) in the plaintiffs' statement of claim.

Ali and **Wan Suleiman F.JJ.** concurred.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Shook Lin & Bok.*

ZAINAB BINTI OTHMAN v. SUPERINTENDENT OF PRISON, PULAU JEREJAK, PENANG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) June 14, 1975]

[Alor Star — Federal Court Civil Appeal No. 141 of 1974]

Practice and Procedure — Costs — Habeas Corpus proceedings — Whether costs payable — Criminal Procedure Code (S.S. Cap. 21) Chapter XXXII, s. 387.

Habeas Corpus — Costs — No order under the Criminal Procedure Code.

In this case the appellant had successfully applied for a direction in the nature of *habeas corpus* for the benefit of her husband who had been detained in prison at Pulau Jerejak. She applied for costs. (See [1974] 1 M.L.J. 189). The application was refused by the learned judge and the appellant appealed to the Federal Court.

Held, dismissing the appeal: as *habeas corpus* proceedings are in a class of their own and can be taken only under the Criminal Procedure Code, the learned judge was correct in holding that there could be no order as to costs under the Criminal Procedure Code and that there were no exceptional circumstances to justify a departure from the ordinary rule.

Cases referred to:-

(1) *Amand* v. *Home Secretary & Anor.* [1943] A.C. 147.
(2) *Munusamy* v. *Subramaniam & Ors.* [1969] 2 M.L.J. 108.
(3) *C.P. Matthew & Ors.* v. *District Magistrate, Trivandrum & Anor.* A.I.R. 1939 P.C. 213.
(4) *Lee Mau Seng* v. *Minister of Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137.
(5) *Lau Lek Eng & 7 Ors.* v. *Minister of Home Affairs, Singapore & Anor.* [1972] 2 M.L.J. 4.
(6) *Wee Toon Lip & 3 Ors.* v. *Minister of Home Affairs, Singapore & Anor.* [1972] 2 M.L.J. 46.
(7) *Lim Hock Siew & Ors.* v. *Minister of the Interior and Defence, Singapore* [1968] 2 M.L.J. 219.
(8) *Ex parte Johannes Choeldi & Ors.* [1960] M.L.J. 184.
(9) *Aminah* v. *Superintendent of Prisons, Pengkalan Chepa, Kelantan* [1968] 1 M.L.J. 92.
(10) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129.
(11) *Assa Singh* v. *Menteri Besar, Johore* [1969] 2 M.L.J. 30.
(12) *Re Datuk James Wong Kim Min* [1975] 2 M.L.J. .....
(13) *Fu Tze Man* v. *Attorney-General* [1960-63] S.C.R. 20.
(14) *Secretary of State for Home Affairs* v. *O'Brien* [1923] A.C. 609.
(15) *Nanyang Development (1966) Sdn. Bhd.* v. *How Siew Poh* [1969] 1 M.L.J. 232.
(16) *Johnson* v. *R.* [1904] A.C. 817.

FEDERAL COURT.

Karpal Singh for the appellant.

Abu Talib bin Osman (Senior Federal Counsel) for the respondent.

Suffian L.P.: The applicant (appellant before us) applied by notice of motion in the High Court at Penang for a direction in the nature of *habeas corpus* for the benefit of her husband who was detained in the prison at Pulau Jerejak. She succeeded and the court ordered her husband's release, see [1975] 1 M.L.J. 76.

Counsel for her then applied for costs against the Superintendent of Prison, Pulau Jerejak (respondent in the lower court and before us). The learned judge refused the application and the applicant appeals to us.

The main ground of appeal is that the learned judge has misapplied the test laid down by the House of Lords in *Amand* v. *Home Secretary and Another.*[1] There Amand, a Dutch national who had resided in England for fourteen years, was arrested as an absentee without leave from the Dutch army in Britain, in which he was a conscript. He was taken before a magistrate with a view to his being handed over to the Dutch military. He applied for a writ of *habeas corpus.* The Divisional Court refused the application. He appealed to the Court of Appeal. By the Supreme Court of Judicature (Consolidation) Act, 1925, section 31(1) "No appeal shall lie — (a) except as provided by the Criminal Appeal Act, 1907, or this Act from any judgment of the High Court in any criminal cause or matter." The Court of Appeal held that it had no jurisdiction to entertain the appeal. Amand appealed to the House of Lords who held that the judgment appealed from was in a "criminal cause or matter" and that accordingly the Court of Appeal had no jurisdiction to hear the appeal. In his speech Viscount Simon L.C. stated at page 155:

"If ... the application for the writ of *habeas corpus* is refused, and the question arises whether an appeal lies against such refusal, a distinction must be made. If the judgment of the High Court refusing the writ is in any criminal cause or matter no appeal lies. If it is not, an appeal is competent. This distinction between cases of *habeas corpus* in a criminal matter, and cases where the matter is not criminal goes back very far."

His Lordship then mentioned the history of the distinction. He then continued:

"It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

It will be noted that it is the nature and character of the *proceeding* in which *habeas corpus* is sought which provide the test. Mr. Karpal Singh argues before us that the learned judge did not have regard to the nature and character of the proceeding, but instead had regard to the nature of the *person* concerned, namely, the applicant's husband. With all due